Supreme Court, U.S.
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No. 80-193

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED, *Petitioners,*

*vs.*

THE GENERAL MOTORS CORPORATION, *Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF OF PETITIONERS

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PETITION FOR CERTIORARI FILED AUGUST 8, 1980

CERTIORARI GRANTED NOVEMBER 3, 1980

## Questions Presented

1. Whether a provision in respondent's pension plan which sanctions a forfeiture of vested retirement benefits by offsetting the amount of a subsequent workers' compensation award against the retiree's pension is unlawful under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1053.

2. Whether Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 (prohibiting offsets of workers' compensation awards against retirement pensions) is a proper exercise of state power, not pre-empted by E.R.I.S.A., 29 U.S.C. 1144.

## Parties to the Proceeding

Petitioners in Case No. 80-193:

Henry Buczynski, Alex Borusovic and Other Retirees Similarly Situated

Respondent in Case No. 80-193:

The General Motors Corporation

Intervenor:

State of New Jersey

As Amicus Curiae:

Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller and George Zihol

Gray Panthers

Shenango, Inc., U.S. Steel Corp., Crucible, Inc., Jones & Laughlin Steel Corporation, Mesta Machine Company, Pullman-Standard and Wheeling-Pittsburgh Steel Corp.

United States (Tax Division, Department of Justice)

Appellants in Case No. 79-1943:

Joseph Allessi, Raymond Buisson, Stephen Michalski, Charles Repka, Helen Vogt and T. Edward White

Appellees in Case No. 79-1943:

Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc. Employee Retirement Plan

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*Petitioners,*

*vs.*

THE GENERAL MOTORS CORPORATION,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF OF PETITIONERS

### Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 616 F.2d 1238 and is reproduced at page 89a of the Joint Appendix. The opinions of the United States District Court, District of New Jersey, in *Buczynski* are reported at 456 F.Supp. 133, and are reproduced in the Joint Appendix at pages 54a and 70a respectively. *Alessi* (Docket No. 79-1534) was unreported at the District Court level.

### Statement of Jurisdiction

The jurisdiction of this Court is envoked under 28 U.S.C. §1254(1).

The Judgement of the Court of Appeals (J.A. 119a) was entered on February 15, 1980. Said Judgment was

certified and issued in lieu of a formal mandate on March 27, 1980 (J.A. 122a).

A timely Petition for Re-hearing was filed and was denied on March 19, 1980. On June 2, 1980, Justice Brennan of this Honorable Court entered an Order Extending Time to File Petition for Writ of Certiorari to August 16, 1980.

A Petition for a Writ of Certiorari to the United Court of Appeals for the Third Circuit was timely filed and said Writ was granted by this Court on November 3, 1980. The case was consolidated with *Joseph Alessi et al.* v. *Raybestos-Manhattan, Inc., et al.,* No. 79-1943, where probable jurisdiction was noted on the same date.

## Statutes and Regulations Involved

The following Statutes and Regulations which are primarily involved in this case are set forth fully in the Appendix to this Brief:

26 U.S.C. §401(a)(5)
29 U.S.C. §1002(19)
29 U.S.C. §1053(a)
29 U.S.C. §1144(a)
N.J.S.A. 34:15-29
26 C.F.R. §1.411(a)-4(a)

## Statement of the Case

On August 5, 1977, plaintiff-petitioners Henry Buczynski and Alex Borusovic, on behalf of themselves and "all other retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, similarly situated," instituted the instant action against The General Motors Hourly-Rate Employees Pension Plan (hereinafter referred to as the GM Pension Plan) (J.A. 8a).

The plaintiffs are all retired employees of the General Motors Corporation who, at the time of their retirement,

were employed by the General Motors Corporation in New Jersey. Each member of the plaintiff class was receiving a retirement pension under the GM Pension Plan when he collected a workers' compensation award for a work-related injury. Plaintiff Buczynski received approximately $2500.00 and plaintiff Borusovic received approximately $2300.00. The petitioners subsequently suffered a total loss from their pensions equal to the amount of the compensation awards.

Article IV, §2 of the GM Pension Plan provides:

> Section 2. Deductions of Workmen's Compensation
>
> In determining the monthly benefits payable under this Plan, a deduction shall be made *unless prohibited by law,* equivalent to all or any part of the Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for the loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

Petitioners contended that the offset against their retirement pensions in the amount of the workers' compensation awards constituted a total forfeiture of vested retirement benefits in violation of the anti-forfeiture provisions of §203 of E.R.I.S.A., 29 U.S.C. §1053. Additionally, petitioners maintained that this offset violated Chapter 156 of the Laws of 1977 of the State of New Jersey, N.J.S.A. 34:15-29, which provides:

> The right of compensation granted by this chapter [the New Jersey Workers' Compensation Act] may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

This action, originally filed in the Superior Court of the State of New Jersey, was removed, on August 9, 1977, to the United States District Court of the District of New Jersey (J.A. 18a). On August 9, 1978 an Order certifying class action was entered by consent of the parties pursuant to Federal Rule of Civil Procedure 23(b)(2) (J.A. 52a). On August 24, 1978 the District Court issued a Memorandum Opinion (J.A. 54a) in which it held that Section 2 of Article IV of the GM Pension Plan constituted an illegal forfeiture of vested pension benefits under §203(a) of E.R.I.S.A., 29 U.S.C. §1053(a). The Court also determined that Chapter 156 of the New Jersey Laws was not pre-empted by E.R.I.S.A. Upon a motion by the respondent for reconsideration, the District Court, on December 20, 1978, issued a second Opinion and an Order reaffirming its previous Decision (J.A. 70a).

Upon appeal by respondent General Motors Corporation, and with the consolidation of the above-captioned case with the unreported decision in *Joseph Alessi, et al.* v. *Raybestos-Manhatten, Inc., et al.,* which invalidated a similar pension plan provision, a three judge panel for the United States Court of Appeals for the Third Circuit reversed the decision of the District Court and remanded the case to

that Court for the entry of judgment in favor of the General Motors Corporation (J.A. 119a).

On November 3, 1980, this honorable Court granted plaintiffs' Petition for a Writ of Certiorari and consolidated this matter with the *Alessi* case, in which probable jurisdiction was noted by this Court on that same day (J.A. 124a).

## Summary of Argument

The General Motors Corporation Hourly Rate Employees Pension Plan contains a clause authorizing a forfeiture of vested retirement pension benefits by the amount of a workers' compensation award unless such forfeiture is prohibited by law.

Petitioners contend that section 203(a) of ERISA, 29 U.S.C. §1053(a) prohibits offsets of workers' compensation awards against vested retirement pensions in accord with the definition of "nonforfeitable" found in section 3(19) of ERISA, 29 U.S.C. §1002(19). As a deduction for workers' compensation does not appear anyplace in 29 U.S.C. §1053(a), it constitutes an illegal forfeiture.

It is also contended by Petitioners that Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 prohibits the offset of workers' compensation awards against vested retirement pensions. The New Jersey law is a proper exercise of the state's police power in which it has a strong and traditional interest to protect the rights of its working citizens and is not pre-empted by 29 U.S.C. §1144(a).

In its decision below, the Court of Appeals for the Third Circuit held that an offset for workers' compensation awards was not a forfeiture of vested pension benefits made illegal by 29 U.S.C. §1053(a) or §1002(19). It found implicit statutory approval of deductions for Social Security benefits and inferred that workers' compensation awards were similar enough to Social Security benefits to

be permissably offset without violating ERISA. That Court found that the contested offset was specifically authorized by 26 C.F.R. §1.411(a)-4(a) and that this Treasury regulation was a valid "legislative" regulation.

The Court below also held that 29 U.S.C. §1144(a) preempted Chapter 156 of the New Jersey Laws of 1977 which expressly prohibited the offset of workers' compensation awards issued by New Jersey courts against retirement pensions. Consequently, the Court found that Chapter 156 did not prohibit the offset in dispute.

The Court of Appeals reversed, on both issues, the decision of the District Court.

It is respectfully argued by Petitioners herein that the Court of Appeals erred on both issues. The clear, statutory language of ERISA prohibits the total loss of vested pension benefits except as specifically delineated in the Act and no exception for workers' compensation is listed anywhere in the Act. The legislative history of ERISA indicates that Congress intended to strictly limit forfeitures in order to protect employees' rights to receive pension benefits. In that a conflict can be seen between the statute and 26 C.F.R. §1.411(a)-4(a), the Regulation is a nullity. The Court below failed to account for the fundamental distinction between workers' compensation awards and retirement or Social Security benefits. Furthermore, there is no legislative history supporting the proposition that Congress intended to include workers' compensation as a permissable offset.

N.J.S.A. 34:15-29 is also contended by petitioners to be a valid exercise of state authority. It is part of the New Jersey Workers' Compensation Act and intended to protect awards validly adjudicated by that State's Courts.

## ARGUMENT

### I. The provisions of the General Motors Corporation Pension Plan which forfeit an injured retiree's vested pension benefits by the amount of workers' compensation subsequently received violates the vesting and nonforeitability provisions of §203(a) and 3(19) of ERISA, 29 U.S.C. §1053(a) and 1002(19).

#### A. The clear and unambiguous language, history and purpose of ERISA plainly establish that a retiree's rights to a vested pension cannot be lost, forfeited, expended or offset for any reason except those specifically enumerated exceptions delineated in the Act.

The scope and purpose of the Employee Retirement Income Security Act of 1974 (ERISA), is to provide a comprehensive nationwide Federal program for the protection of a retiree's accrued, vested pension benefits. This Act caused a major reformation in existing pension practices and signified a major shift in public policy regarding private pensions from a tax based orientation to one more fundamentally related and concerned with employee retirement income security. Greenough & King, *Pension Plans and Public Policy,* (Columbia, 1976) at 67.

Congressional policy, as embodied in the language and legislative history of ERISA makes clear that ERISA was enacted to improve "the equitable character of private pension plans by requiring them to vest the accrued benefits of employees with significant periods of service." See §2(c) of ERISA, 29 U.S.C. §1001(c). See also, *Reuther* v. *Trustees of Trucking Employees of Passaic and Bergen County Welfare Fund,* 575 F.2d 1074 (3d Cir. 1978). Moreover, Congressional policy declares that with the passage of ERISA, retired workers would not lose "anticipated retirement benefits owing to the lack of vesting in such [pension] plans . . ." §2(a) of ERISA, 29 U.S.C. §1001(a).

Legislative history completely supports the statutory

declaration of policy. The House Labor Committee Report states that ERISA's:

> most important purpose will be to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in necessities to sustain them as human beings within our socitey. H.R. Rept. R. 93-533, 93d Cong., First Sess., reprinted in (1974), *U.S. Code Cong. & Ad. News* at 4646.

This Court in its most recent decision in *Nachman Corporation* v. *Pension Benefit Guarantee Corp., et al.*, —— U.S. ——, 48 U.S.L.W. 4524, 4528 (No. 78-1557, decided May 12, 1980), reviewed, for the first time, the vesting and nonforfeitability requirements of the Act and affirmed the above-described declaration of Congressional policy and intent. Justice Stevens, writing for the majority, reasoned that ERISA was enacted to prevent the "great personal tragedy" suffered by employees whose vested benefits are not paid. This Court in *Nachman,* also declared that Congress had enacted ERISA to prevent the deprivation of "anticipated benefits." 48 U.S.L.W. at 4528.

In order to implement the unambiguous Congressional policy in ERISA, the Act requires that a retiree's rights to his accrued vested pension benefits be nonforfeitable. The House Ways and Means Committee and Senate Finance Committee reported that vesting and nonforfeitability requirements were needed to guarantee that workers received these long awaited pensions:

> Quite apart from the resulting hardship, your Committee believes that such loss of pension rights are inequitable, since the pension contributions previously made on behalf of the employee may have been made in lieu of additional compensation or some other benefits which he would have received." *U.S. Code Cong. & Ad. News, supra,* at 4719 and 4930.

In order to implement this intent, Congress established a general rule of nonforfeitability of vested pension rights under §203 of ERISA, 29 U.S.C. §1053 and §3(19) of ERISA, 29 U.S.C. §1002(19). These two sections provide the time limits and circumstance within which an employee's pension benefits become vested and nonforfeitable. Specifically, §203(a), 29 U.S.C. §1053(a) states:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . .

Section 203(a)(2) of ERISA, 29 U.S.C. §1053(a)(2), provides several alternative "minimum" vesting schedules. The GMC plan has adopted the §203(a)(2)(A) schedule which provides that:

> (A) A plan satisfies the requirements of this subparagraph [participant vesting requirement] if an employee who has at least ten years of service has a nonforfeitable right to 100% of his accrued benefit derived from employer contributions.

Under this plan, a participant who completes ten years of service has at that moment, a vested, nonforfeitable right to receive, when he attains normal retirement age, all retirement benefits derived from employer contributions which he has accrued to that period. The only conditions which he must meet to qualify for the vesting of his accrued pension benefits are the age and years of service requirements under the above-enumerated vesting schedule. It is undisputed that under this schedule, the above-named petitioners satisfied all vesting requirements with regard to age and years of service.

Section 3(19) of ERISA, 29 U.S.C. §1002(19), defines the term "nonforfeitable" when used with respect to a pension benefit or right, as:

> [A] claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from participant's service, which is unconditional, and which is legally enforceable against a plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because a plan contained a provision described in §1053(a)(3) of this Title".[1]

The importance of the rule of nonforfeitability to the effect of the Act is paramount. It is a primary focus of ERISA that a plan participant's pension benefits, once vested, are not to be forfeitable for any reason other than the exceptions delineated.[2]

This formulation is strongly supported by the Congressional legislative history that a retiree's vested pension benefits cannot be subsequently conditioned, lost or forfeited, subject only to the Act's enumerated and limited exceptions.

The House Labor Committee Report specifically states:

> With the limited exceptions noted above, no rights, once they are required to be vested, may be lost by

---

[1] Section 203(a)(3) of ERISA.

[2] The specific exceptions of §203(a)(3) of ERISA, 29 U.S.C. §1053(a)(3) provide that a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides for the:

1. Nonpayment upon a participant's death.
2. Suspension of pension upon the employer's rehiring of the participant.
3. Benefits lost because of certain retroactive plan amendments.
4. Forfeiture of pension if the employee withdraws his mandatory contribution and is less than 50% vested.

It is undisputed that these exceptions are not relevant in the above-captioned case.

> the employee under any circumstances. *U.S. Code Cong. & Ad News* at 4725 (1974).

The Report previously stated that imposing vesting requirements will:

> . . . limit the conditions precedent to receipt of pension rights and will eliminate most of the situations where workers have lost out on their pension. *supra,* at 4651 (1974).

Perhaps the clearest statement contained in the legislative history of ERISA regarding nonforfeitability was in the House Senate Conference Committee Report which said:

> Except as outlined below (the express exceptions), an employee's rights, once vested, are not to be forfeitable for any reason. *U.S. Code Cong & Ad. News,* at 5052 (1974).

Indeed, Congress expressly intended that the imposition of vesting requirements would prevent the loss of anticipated and accrued vested pension benefits for any reason. Article IV, §2 of the General Motors Hourly Rate Empolyee's Pension Plan places an impermissible condition to the actual receipt of vested pension benefits by requiring forbearance of the exercise of statutory rights under state workers' compensation and occupational disease laws. By exercising such rights, petitioners, as well as other class members, would then suffer a forfeiture of vested pension benefits in an amount equal to the compensation award.

Being entirely vested, plan participants should have a nonforfeitable right to 100% of their accrued pension benefits. Nowhere within the above-enumerated sections or exceptions in the Act, is there a provision excepting offsets of workers' compensation recoveries from the general nonforfeitability requirements of §203(a) of ERISA, 29 U.S.C. §1053(a).

Therefore, the implementation of the workers' compensation forfeiture provision allows the Plan to suspend, offset and forfeit vested retirement benefits by the amount of workers' compensation awards, subsequent to the commencement of payment of those retirement pensions, by the Plan. The only way a plan participant can receive 100% of his vested retirement benefits which under §1053(a)(2) were independently earned in the form of deferred compensation, is to forego bringing a claim for injuries sustained in the course of employment under the New Jersey Workers' Compensation Act. This is an untenable provision violative of the clear and unambiguous language and history of the Act.

Congress made no exception to the general rule of nonforfeitability for the integration or offsets of workers' compensation awards from accused vested pension benefits. Rather, it acted to preserve the long-deferred pensions of employees by mandating that vested rights would not be lost for any reason except for those specifically enumerated exceptions in the Act. There is no statutory language or legislative history in which Congress endorses the concept of workers' compensation forfeitures or offsets as permitted exceptions under ERISA. The GMC plan provision which permits the forfeiture of vested pension benefits must be declared void under the unambiguous legislative history, the language, and purpose of ERISA.

It is clear that Congress, in drafting the vesting and nonforfeitability requirements of ERISA, intended to prohibit any provision which would forfeit, suspend, offset or reduce the amount of already accrued vested pension benefits a worker expects to have upon his retirement. The history, language and purpose of ERISA demonstrates that Congress intended that each pension plan participant should maintain and ultimately receive all vested benefits accrued as of any given date.

**B. The weight of judicial authority concerning ERISA supports petitioners' contention that the GMC plan's workers' compensation offset against vested retirement pensions violates the vesting and nonforfeiture requirements of the Act.**

The United States Supreme Court in *Nachman, supra,* held that a collectively bargained plan provision disclaiming employer liability for pension fund deficiencies does not render such benefits forfeitable, since the provision did not qualify the right against the plan for the full amount but merely limited the source of collection to which a retiree remained fully entitled.

In arriving at this holding, this Court was called upon to give its interpretation of §§3(19) and 203 of ERISA and recognized the importance and the sweeping nature of the vesting and nonforfeitability requirements. This Court observed that any provision in a plan which sanctions a forfeiture of vested benefits, other than those enumerated, is made illegal by ERISA. The majority observed:

> Section 203(a) is a central provision in ERISA. It requires generally that a plan treat an employee's benefits, to the extent that they have vested by virtue of his having fulfilled age and length of service requirements, no greater than those specified in §203(a)(2) as not subject to forfeiture. A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection §(a)(3) would violate this section after January 1, 1976, its effective date. 48 U.S.L.W. at 4526 n. 10.

In analyzing ERISA, Justice Stevens noted that this major pension reform act was enacted to make ". . . sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever

conditions are required to obtain a vested benefit—that he actually receive it." There is no question that the GMC Plan is a "defined pension benefit" plan. The petitioners herein have fulfilled those conditions required to obtain vested benefits, i.e., they have met the age and service requirements of §203(a)(3) of ERISA, 29 U.S.C. §1053(a)(3). Therefore they are entitled to actually receiving the full amount of their vested retirement pension benefits. These petitioners have suffered a total forfeiture of their vested pension benefits during the time respondents applied the workers' compensation offset provision.

The *Nachman* court in noting "that the terms 'vested' and 'nonforfeitable' were used synonomously" in ERISA, 48 U.S.L.W. at 4528 also referred to the Title I definition of "vested liabilities" which provided that:

> The term vested liabilities means that present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable. *Id.*

It is therefore logical to conclude that for the purposes of Title I, "vested" is synonomous with "nonforfeitable". The *Nachman* court maintained that Congress clearly intended to invalidate any pension plan provision which forfeits or limits the rights of retirees to their vested pension benefits. Specifically, the Court stated that:

> A provision in a plan which is construed as a condition, the failure of which would cause a forfeiture, would be invalid after January 1, 1976. 48 U.S.L.W. at 4528 n. 19.

It is important to note that Justice Stewart, in his dissent in *Nachman,* reiterates and concurs with the majority to the extent that they define the term "nonforfeitable" as precluding any "conditions" to the receipt of vested pension benefits. Justice Stewart referred ap-

provingly to the comments of Representative Perkins, a leading sponsor of ERISA:

> As the Chairman of the House Committee on Education and Labor explained with regard to an earlier bill's definition of "nonforfeitable", almost identical to that contained in 29 U.S.C. §1002(19) as finally enacted: 'The definition of the term "nonforfeitable" is intended to preclude any conditions to receipt of vested benefits other than those noted in the definition.' 48 U.S.L.W. at 4532, (n)(9).

Furthermore, the dissenting opinion, while reviewing regulations by the Pension Benefit Guaranty Corporation maintained that:

> [I]nsofar as the Pension Benefit Guaranty Corporation's own definition of "nonforfeitable", see 29 C.F.R. §2605.6(a), departs from §1002(19), it must be rejected. Nothing in the Act or in the legislative history reflects a Congressional intent to give Pension Benefit Guaranty Corporation the authority to define the scope of its own entitlement to employer assets." 48 U.S.L.W. at 4531, n. 5.

Furthermore, Justice Stewart reasoned that:

> To the extent that Pension Benefit Guaranty Corporation's own self-serving definition in 29 C.F.R. §2605.6(a) points in a different direction, it conflicts with the statute and can be accorded no weight." 48 U.S.L.W. at 4532, n. 10.

Thus, the only expression by the United States Supreme Court as to the meaning of §203 and §3(19) of ERISA clearly demonstrates that the vesting and nonforfeiture requirements of ERISA invalidates any provision which purports to sanction a forfeiture of vested pension benefits, or condition the receipt of accrued vested benefits, by any reason other than those enumerated in the Act.

In the instant situation, Article IV, §2 of the GMC Plan purports to forfeit and nullify entirely a petitioner's claim to his vested benefits guaranteed by §203 and 3(19) of ERISA by the amount subsequently received through a workers' compensation recovery. It becomes apparent that upon completion of ten years service, a pension right vests to 100% of accrued benefits contributed by his employer. Section 203(a)(2) of ERISA, 29 U.S.C. §1053 (a)(2). Vesting is synonomous with nonforfeitable. *Nachman, supra.* A pensioner's accrued retirement benefit, once vested, becomes nonforfeitable and cannot be lost except under the limited situations defined in the Act. The workers' compensation forfeiture is not within those exceptions. The GMC Plan provision, which conditions the receipt of the full vested pension benefit upon the forebearance of the workers' compensation claim works a forfeiture on the vested retirement pension in violation of the nonforfeitability requirements of the Act.

In addition to the decision in *Nachman,* the overwhelming weight of judicial authority under ERISA prior to *Buczynski,* supports the proposition that the offset of workers' compensation payments constitute unlawful forfeitures of injured retirees' vested rights violative of the vesting and nonforfeitability requirements of the Act.

The first major decision invalidating a workers' compensation offset provision in a pension plan (also the most recent decision from the United States District Court for the Eastern District of Michigan) is *Utility Workers Union of America* v. *Consumers Power Co.*, 453 F.Supp. 447 (E.D. Mich. 1978). The decision in *Utility Workers* is in full accord with this Honorable Court's language and interpretation of §203 of ERISA in *Nachman.* The District Court reasoned that "the plight of the worker apparently prompted the broad nonforfeitability language of §203(a), 29 U.S.C. §1053(a). 453 F.Supp. at 454. That Court, drawing upon the legislative history of the act, stated:

> Congress did not intend to exempt workers' compensation payments from the nonforfeitability requirements of ERISA . . . the workmen's compensation offset provision of this pension plan places a condition on the plaintiff's claim to monthly benefits which makes that claim legally unenforceable against the plan. It therefore constitutes a forfeiture as that term is used in ERISA. The language of the statute is clear and unambiguous. The reasoning of the defendant is tenuous and speculative. The Court chooses to follow the plain meaning of the statutory language. *Id.* at 456.

In *Stong* v. *Bucyrus-Erie Co. and Bucyrus Hourly Retirement Plan,* 472 F.Supp. 1088 (E.D. Wi. 1979), recon. denied, (December 10, 1979), and currently pending before the United States Court of Appeals for the Seventh Circuit, Judge Gordon, writing for the majority, presented a thorough and well-reasoned analysis of the vesting and nonforfeitability provisions of ERISA. The Court held in clear and unmistakeable language that:

> The statute [ERISA] applies unambiguously to this case: the pension plan must provide that an employee's right to his normal retirement benefits is nonforfeitable; a nonforfeitable right is unconditional and legally enforceable against the plan; the workers' compensation offset provided in the defendant's pension plan imposes a condition subsequent on employee's right to normal retirement benefits; the imposition of this condition makes an employee's claim forfeitable within the meaning of §1002(19) and therefore violates Subsection 1053(a). See *Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409 (2d. Cir. 1977), *Utility Workers, supra,* at 456. In my opinion, no other conclusion could be reached without seriously upsetting the intent of Congress as manifested in the plain meaning of the Act. 472 F. Supp. at 1091.

Another decision invalidating workers' compensation offset provisions is *Server* v. *Interspace Corp.*, Appeal Docketed No. 79-3832 (9th Cir. December 7, 1979). Of course, the lower court decision for the District of New Jersey, in *Buczynski* and *Alessi,* invalidated workers' compensation offsets but were reversed by the three judge panel for the United States Court of Appeals of the Third Circuit in *Buczynski.* The court in *Carpenter Technology Corp.* v. *Boyton,* Civ. No. 78-1415 (D.N.J. December 12, 1979), modified (D.N.J. March 7, 1980) also held that T. Reg. 1.411(a)-4(a) was contrary to vesting provisions in ERISA, prior to being modified to accord with *Buczynski.*

Two minor decisions of the United States District Court for the Eastern District of Michigan, decided prior to *Utility Workers,* arrived at contrary conclusions. *Bordine* v. *Evans Product Co.*, 453 F.Supp. 19 (E.D. Mich. 1978), and *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. January, 10, 1978), are both erroneous in their conclusions due to the excessive reliance upon treasury regulations enacted under the Internal Revenue Code of 1954 and their complete disregard of the unambiguous language of §203 of ERISA, 29 U.S.C. §1053(a). Both of these decisions also failed to address or discuss the clear statutory language and legislative history surrounding ERISA. Moreover, Judge Pratt reversed his earlier decision in *Carlson* v. *Bundy Manufacturing Co.*, Civ. No. 6-72274 (E.D. Mich. August 18, 1977), in *Utility Workers,* where he maintained that:

> The conclusion of the Court reached in *Carlson,* that an offset contained in a plan, if reasonable, is permissible, resulted from excessive attention to the phrase under the plan found in the definitional section of ERISA, 29 U.S.C. §1002(22), (23), 'accrued benefit' and 'normal retirement benefit'. The proper question is not whether the plans provisions are reasonable, but whether they are contrary to the statute, *supra,* at 452, n. 8.

Furthermore, *Pavlovic* is also distinguishable for its reference to the subsequently overruled decision of Judge Pratt in *Carlson*. It should also be noted that the decisions in *Bordine* and *Pavlovic* were rejected by the later decision in *Stong*.

Other cases decided under 29 U.S.C. §1053(a), though not dealing specifically with workers' compensation offsets, are quite relevant to show that any pension forfeitures, absent the limited exceptions, violate ERISA. In *Riley* v. *MEBA Pension Trust,* 570 F.2d 406 (2d Cir. 1977), the Second Circuit Court of Appeals, citing the House Labor Committee Report, discussed *infra,* held:

> When §203(a)(3)(B) [29 U.S.C. §1053(a)(3)(B)] provides that certain suspensions [of pension benefits] are not forfeitures, it necessarily implied that those not falling within its terms *are.*"

The *Riley* Court determined that whether an employee's pension benefits were regarded as suspended or terminated had no significance with respect to its violation of ERISA's nonforfeiture and vesting provisions. Moreover, the *Riley* Court observed that the language of ERISA required a strict reading of the term "nonforfeitable" since it is specifically and broadly defined in §3(19) of ERISA. The Court ruled that:

> As regards employer contributions, the employee's right must be nonforfeitable if he has met certain conditions relating to age and years of service which Riley concededly has done. Section 3(19), 29 U.S.C. §1002(19) defines 'nonforfeitable' as meaning, among other things, a claim 'which is unconditional and which is legally enforceable against the plan.' The provision of Article II A, §13, quoted above, fn. 2, places a condition on Riley's claim to the monthly benefits to which he otherwise would be entitled and makes his claim legally unenforce-

> able against the Plan; it thus constitutes a forfeiture within the meaning of ERISA.

Thus, *Riley* further urges this Court to hold that the instant offset and reduction of retirement benefits imposed by the GMC Plan constitutes an impermissible forfeiture of vested benefits. Just as Riley's claim to monthly benefits was conditioned (upon his not working in the maritime industry), the claims of the individual plaintiffs here are also conditioned (upon their not receiving workers' compensation benefits). The *Riley* Court concluded that "each month's denial constitutes a separate forfeiture and a separate wrong" under ERISA. 570 F.2d at 411.

In *Winer* v. *Edison Brothers Stores Pension Plan,* 447 F.Supp. 836, 837 (E.D. Mo. 1978), the lower Court stated:

> The Act (ERISA) was intended to protect employee's rights in their pension plans. Forfeitures, absent specific exceptions, are disfavored.

See also, *Fremont* v. *McGraw-Edison Co.,* 606 F.2d 752 (7th Cir. 1979).

On appeal in *Winer* v. *Edison Bros. Stores Pension Plan,* 593 A.2d 307 (8th Cir. 1979), the United States Court of Appeals for the Eighth Circuit was asked to determine whether a specific provision in a pension plan was permissible under ERISA. In particular, the pension plan provision involved whether a Retirement Committee could deny vested rights to employees who engage in so-called bad conduct. The plan argued in that case that ERISA did not alter their ability to interpret and apply the terms of the plan and that the interpretation was binding on the court. The *Winer* court held this argument was defective and that the plan provisions operated as an automatic forfeiture, which was inconsistent with the remedial purposes of ERISA. The *Winer* court concluded that such a system in effect constituted

a prohibited forfeiture of vested pension rights, contrary to ERISA.

As in the instant case, a plan provision cannot be validated simply because it is one of the terms of the plan. A workers' compensation offset of vested pension benefits cannot be authorized under such a rationale. Accordingly, the GMC forfeiture provision must fall.

In addition, in *Keller* v. *Graphic Systems of Akron, Inc., Employees' Profit Sharing Plan,* 422 F.Supp. 1005 (N.D. Ohio 1976), the Court stated that:

> §1053 of ERISA sets forth minimum vesting standards for private retirement plans which assure employees of attaining vested rights to benefit after a stated period of service. 19 U.S.C. §1053. It further delineates a limited number of situations in which an employee's vested rights to benefit may be forfeited. Thus as explained in House Conference Report No. 93-1280, with the exceptions specifically provided for in §1053(a)(3) 'an employee's rights, once vested, are not to be forfeitable for any reason.' *supra,* at 1008.

Several other cases decided under ERISA also give clear indication that the Congress' strong purpose and intent in enacting ERISA was to protect employees from having their vested pension benefits deducted, offset or forfeited. For example, in *Lewis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 431 F.Supp. 271, 277 (E.D. Pa. 1977), it was determined:

> ERISA was enacted to protect pension plan participants and beneficiaries. Exculpation from any of the rights conferred cannot be permitted if the Act is to remain faithful to its mandate.

Further, in *Amory* v. *Boyden Associates, Inc.,* 434 F. Supp. 671 (S.D.N.Y. 1976), the Court reasoned that all forfeitures under ERISA are *per se void.* These cases

further express and reemphasize the overwhelming judicial authorities which have held that forfeitures, in particular workers' compensation and occupational disease offsets, are violative of ERISA and are hence void. As expressed by the Court in *Mosley* v. *National Maritime Union Pension and Welfare Plan,* 438 F.Supp. 413 (E.D. N.Y. 1977), the purpose of ERISA was to "remedy the significant defects covered in the structures" of many of the earlier pension plans. Such defects included many unfair and arbitrary provisions, *Mosley, supra,* at 422, which operated as forfeitures of retirement pension benefits.

In light of the above-mentioned judicial decision, as well as the language, history and purpose of ERISA, it becomes quite clear that the decision in *Buczynski,* stands alone as an abberation in the area of retirement income security. Even a cursory reading of the opinion in *Buczynski* makes it quite clear that the court, for some inescapable reason, fails to address or even consider the concept of *vesting* of retirement pension benefits under §203(a) of ERISA. This Court in *Nachman* and all the other decisions, cited above indicate that the vesting protections of ERISA were a major purpose and reason for the passage of this Act. ERISA must provide security to retired pensioner's pension benefits; the Act, as interpreted by *Buczynski,* would be a nullity. ERISA is an "employee-oriented" Act, which is to be interpreted by "equitable principles". See *Reuther.* There is no equity, security or vesting protection for plan participants if the law is, as stated by the lower court in *Buczynski.*

The GMC Plan in question, affects the vested pension benefit itself and eliminates a participant's claim to that portion of his already vested benefits that is reduced because of a separate workers' compensation recovery. There is no statutory language or any legislative history which permits workers' compensation offsets. There are no other interpretations which can be supported by ERISA.

The offset of vested retirement pension benefits by the concurrent receipt of workers' compensation payments is an impermissible forfeiture which must be declared illegal and void under the Act.

**C. The clear language of 29 U.S.C. §1053 supercedes contradictory Treasury Regulations and Revenue Rulings, making the offset of workers' compensation awards against vested retirement benefits prohibited.**

The failure to distinguish the unique nature of workers' compensation awards from retirement pensions and Social Security benefits is a fundamental error in the decision of the Court below, the argument of defendant-respondent and the position of the Treasury Department in its issuance of certain regulations and subsequent Revenue Rulings. This error is manifest in the Court of Appeals approval of the I.R.S.' impermissable expansion of clear statutory language.

The Court below began its inquiry into the legality of the workers' compensation offset by analyzing 26 C.F.R. §1.411(a)-4(a) (1979), rather than starting with the superior expression of the law—the statute itself. [J.A. 99a] In relevant part the regulation states:

> Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or any other Federal or State law and which are taken into account in determining plan benefits.

The Court of Appeals noted that the regulation was issued under 26 U.S.C. §411, the Internal Revenue Code's anti-forfeiture provision which is substantally identical to §203 of ERISA, 29 U.S.C. §1053. See J.A. 98a, n. 8. Both sections concern the general requirement of non-forfeitability of benefits except for the same exceptions appearing in each respective section (none of which is relevant to this case).

An examination of 26 U.S.C. §411 (or 29 U.S.C. §1053) reveals that nowhere in that statutory provision is there authorization by Congress permitting an offset of workers' compensation awards against a nonforfeitable pension right and the pension right remaining nonforfeitable.

Although the regulation purports to interpret 26 U.S.C. §411, it seems obvious that it is an attempt to incorporate §401(a)(5) of the Internal Revenue Code, 26 U.S.C. §401 (a)(5). This section of the Code provides that a pension plan shall be qualified and not "be considered discriminatory . . . because the contributions or benefits of or on behalf of employees . . . differ because of any retirement benefits created under State or Federal law." Defendant-respondent has claimed this section as the statutory source permitting the offset contested in this case. The Court of Appeals has also relied on this provision as the basis for justifying the offset and related Trasury regulations.

The Court below also relied heavily on its interpretation of 26 U.S.C. §401(a)(15) to justify the offset. This provision, enacted concurrently to, but separate from the passage of ERISA, disqualifies plans unless penions "are not decreased by reason of any increase" in Social Security benefit levels obtained at the earlier date of benefit receipt or separation from employment. §401(a)(15) specifically limited the amount of permissible Social Security offsets. In concluding that §§401(a)(5) and (15) authorize the offset of workers' compensation awards against vested retirement pensions, the Court of Appeals has approved the subversion of Congress' plain and intended language.

The Court, at pages 106a through 111a (J.A.) of its opinion, constructed a labyrinthe of inferences and implications to permit the offset. The Court found that §401(a)(5) permitted vested pension benefits to be offset by all types of Social Security benefits, presumably from the phrase "retirement benefits created under State or Federal Law" and the more specific reference to Social Security in §401(a)

(15). At pag 107a (J.A.) of its opinion, the Court concluded that "... Congress gave its *implicit* approval to the practice of permitting ... an offset of Social Security benefits against pension plan benefits." (emphasis added). The Court, relying on the statutory reference to the Social Security Act in §401(a)(15), finds that since Social Security disability benefits flow from the same federal fund as Social Security retirement benefits, are therefore includable as an offset of a "retirement benefit created undr State or Federal Law." The Court infers at page 108a (J.A.) that "the Social Security offset that Congress has approved includes, perforce, an offset against pension benefits for *disability* benefits." (Court's emphasis). The Court has drawn an inference based on a perceived implication.

The Court continues to expand the meaning of "retirement benefits" by reasoning that since Social Security provides "disability benefits" and workers' compensation awards are for "disabilities", the distinction between the two is "meaningless." Therefore workers' compensation awards for "disabilities" are "retirement" benefits, permissably offset against vested retirement pensions. The Court has found an 'implicit' offset of Social Security retirement benefits and inferred the inclusion of Social Security disability benefits. It has confused the generic, plain, ordinary meaning of "disabilities" for a term of art and simplistically ignored the fundamentally distinct natures of retirement pensions, Social Security benefits and workers' compensation awards.

The Court below, well aware that New Jersey's workers' compensation statute is the exclusive means of redress for an employee's work related injuries, reaches a result that effectively denies compensating relief to the employee. Should a retired employee secure a judgment for work related injury, the full amount of such award is offset against the retirement pension.

Legislative history supporting the proposition that Congress *intended* to include workers' compensation awards as a permissable forfeiture against a vested retirement pension is minimal. It is clear that ERISA's exacting requirements to secure qualification of a plan are intended to protect the nonforfeitability of vested pension benefits. That Congress anticipated the offset of benefits from Social Security is evident in §401(a)(15). However, that section is a limitation on the amount of the offset by freezing the level of offset at the earliest of two events. Congress was absolutely specific as to how Social Security should be accounted. Had it intended to include workers' compensation awards, there certainly would have been Congressional discussion on the subject, and possibly, even, a statute specifying to employees, employers, and the fifty states the nature and application of such an offset.

The Court of Appeals permits the offset of workers' compensation awards because it found Treasury Regulation §1.411(a)-4(a) valid. The Court made two serious errors in its analysis, either of which necessitates reversal of its decision and requires invalidation of the Regulation.

The Court erroneously regarded the Regulation as "legislative"—nearly invulnerable to that Court's perspective. Judge Garth amplified his views on the correct characterization of regulations (whether "interpretive" or "legislative") and articulated the standard for judging the validity of such characterized regulations. *Baker* v. *Otis Elevator,* 609 F.2d 686 (3rd Cir. 1979). As to "legislative" regulations he stated "we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole." (J.A. 100a).

The quintessential examples of "legislative" regulations occur where Congress *expressly* authorizes an agency to define the terms of a statute and enact the rules for its effectuation. See, e.g., *Baterton* v. *Francis*, 432 U.S. 416 (1977). Regulations not stemming from express, statu-

tory authorization are "interpretive regulations, persuasive to the extent they are logical and consistent and based on the regulating agency's expertise in a particular area. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

The Circuit Court characterized 26 C.F.R. §1.411(a)-4(a) as "legislative", derived from 29 U.S.C. §1202(c), §3002(c) of ERISA. (J.A. 100a). However, this section of ERISA merely prohibited the Department of Labor from prescribing regulations inconsistent with Treasury interpretations of §§410(a), 411 and 412 of the I.R.C. It was clearly not an express grant by Congress of "legislative" authority, but rather, constitutes a grant of "interpretive" regulatory authority. Consequently, 26 C.F.R. §1.411(a)-4(a) cannot bear the great weight placed on it by the Court below.

The second major error in the Court of Appeals reasoning is its conclusion that Regulation §1.411(a)-4(a) validly authorized the offset of workers' compensation. The Court premises its finding on the fact that Regulation §1.411(a)-4(a) was enacted under §411 of the Code, the antiforfeiture provision analogous to §203 of ERISA (29 U.S.C. §1053). As discussed, *supra*, the regulation incorporates the statutory areas contained in §§401(a)(5) and (15) when it separately refers to Social Security benefits and ". . . any other Federal or State law (benefits) . . ."

Upon reading 26 C.F.R. §1.411(a)-4(a), §411 of the Code and §203 of ERISA, it is absolutely clear that neither of the statutes authorizes forfeiture of vested benefits as asserted in the regulation. The regulation purports to authorize reductions for Social Security or "any . . . Federal or State" benefits. But clearly the regulation's authorization of such benefits squarely conflicts with the strict antiforfeiture provisions of I.R.C. §411 and ERISA §203. Treasury regulations are without force if they conflict with the statute. *Service Life Insurance Co.* v. *United States*, 293 F.2d 72 (8th Cir., 1961). A regulation which operates to create a rule out of harmony with the statute is a mere nullity." *Manhatten General Equipment Co.* v. *Commissioner*, 297 U.S. 129 (1936).

In that 26 C.F.R. §1.411(a)-4(a) attempts to expand the antiforfeiture statutes, it is an impermissible amendment of the statutes. A statute cannot be amended by regulation. *Koshland* v. *Helvering,* 298 U.S. 411 (1936). However, this is precisely what the regulation does. The I.R.S., by dropping the word "retirement" from the regulation has eliminated the Congressional intent to carefully narrow the type of benefit, permissibly offset. Although §1.411(a)-4 (a) unmistakeably alludes to 26 U.S.C. §401(a)(5), it fails to remain true to the statute's plain meaning. The regulation has permitted a class of offsets much broader then "retirement benefits created under State or Federal law." Even assuming that §401(a)(5) of the Code, originally enacted prior to ERISA, is the source of some kind of permissible offset not specifically an exception contained in the antiforfeiture provisions, §401(a)(5) does not permit the offset of workers' compensation award as included within the meaning of "retirement benefits created under State or Federal law."

26 C.F.R. §1.411(a)-4(a) does not specifically authorize the offset of workers' compensation awards. Rather, defendant-respondent and the Court below find support for the regulation's allowance of the offset in Revenue Ruling 68-243, 1968-1 CB 157, a ruling that predated ERISA by six years, and was addressed to nondiscrimination issues rather than nonforfeitability. It is important to note that the interests of workers' compensation recipients was not represented in the I.R.S.'s procedures for the issuance of such Rulings.

The precedential value of any Revenue Ruling is dubious at best. Rulings like 68-243 are merely the opinions of a lawyer in the agency and are not intended to create legally binding rights or obligations. *Stubbs, Overbeck & Associates* v. *United States,* 445 F.2d 1142 (5th Cir., 1971).

Defendant-respondent has drawn a negative inference to support its offset, that Congress reenacted Revenue Ruling 68-243 by not specificly rejecting it when ERISA was

passed. It is unreasonable, however, to assume that Congress could account expressly in a statute for every contradictory Ruling. As the Court of Appeals for the Second Circuit stated in *F.W. Woolworth Co.* v. *United States*, 91 F.2d 973 (2nd Cir., 1937); *cert. den.*, 302 U.S. 768 (1938):

> To suppose that Congress must particularly correct each mistaken construction under the penalty of incorporating it into the fabric of the statute appears . . . unwarranted.

The *Buczynski* court states that Congress was aware of 68-243 when enacting §203(a) of ERISA by citing the report of the Conference Committee which states:

> Moreover, the conferences intend that the anti-discrimination rules of present law in areas other than vesting schedule are not to be changed. Thus the present anti-discrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the anti-discrimination rules may be applied with respect to benefit accruals. *3 U.S. Code Cong. & Admin. News*, 5038, 5058 (1974).
>
> This history of IRS practice with respect to workers' compensation offsets, has Congressional preservation of the anti-discrimination rules, suggest that, if anything, Congress approved of workers' compensation offsets. *Buczynski, supra*, at 1248.

It is patently obvious that the reference to the conference report not only fails to show that Congress knew or approved workers' compensation offsets, but with its reference to vesting schedule changes in current pension law, adds further weight to the argument that with the reformation of the vesting and nonforfeitable provisions of ERISA, this offset must be deemed totally and completely invalid.

Initially, 68-243 draws a mysterious distinction between workers' compensation laws which provide an employee's exclusive avenue for recovery for work related injuries and recoveries obtained for the same injuries through traditional tort claim procedures. The Ruling then permits an offset against retirement pensions by workers' compensation awards, but prohibits offset of recoveries obtained at common law, on the basis that an offset of tort damages would allow the employer to pay his own liabilities out of the assets of the pension fund.

This Revenue Ruling demonstrates a profound ignorance of the nature of workers' compensation payments as comprehensive replacement of traditional tort damages which (like tort damages) remain the exclusive liability of the employer. The Internal Revenue Service is apparently unaware that workers' compensation statutes were enacted in lieu of the common law remedy. The force of Revenue Ruling 68-243 "as an aid to the interpretation of the statute is impaired by [this] internal inconsistency." *U.S.* v. *Calamaro,* 354 U.S. 351 at 359, n. 12 (1957).

Congress must be presumed to know and mean what language it uses in its statutes. §401 (a)(5) explicitly states "retirement benefits created under State or Federal laws" thereby excluding all "benefits that are not "retirement" ones which are "created under . . . law". An analysis of what type of "benefit" a worker's compensation award is, demonstrates that it is not a "retirement" benefit.

The New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1, *et seq.,* originates from 1911. The statute was in derogation of the common law right of recovery by a servant against a master for tortious injury sustained through the course of employment. *Sharp* v. *Borough of Vineland,* 1936, 14 N.J. Misc. 256, 183 A.911; affd., 117 N.J.L. 598, 190 A.44 and 118 N.J.L. 567, 6A.2d 386. The traditional common law action was replaced by a statutory scheme that standardized the amount of damages recoverable for a particular injury. The Act was intended to eliminate in-

equities and the cumbersome and vigorous standards of proof needed for a successful claim. *Dudley* v. *Victor Lynn Lines, Inc.*, 32 N.J. 479 (1960).

However, the overall purpose of the Act was to better serve the same social policy evident in the common law right of a servant: compensation to the employee for injury resulting from the domain of the employer, the workplace. As the New Jersey Supreme Court stated in *Renshaw* v. *United States Pipe & Foundry Co.*, 30 N.J. 458 (1959):

> "Liability for workmen's compensation, or the extent thereof, is not based on the impairment or loss of earning power, but rather the loss ensuing from personal injury as it detracts from the former efficiency of the workmen's body or its members in the ordinary pursuits of life."

Today, the Act provides employees' sole avenue for redress of injuries sustained on the job.

The New Jersey Courts have accurately expressed the character of the compensation and it is clearly not one of retirement. Prior to 1911 in New Jersey, the right to sue an employer for workplace injury was recognized at common law, and the personal injury awards were enforceable. The "benefits" stemming from a successful suit were "created" (originally conceived and existent) at common law. In this light, it can be seen that New Jersey workers' compensation awards are not "retirement benefits created under State or Federal law".

The administration of the Act indicates its logical relation to general tort actions. An employee must establish in court that an injury was sustained during the course of employment by the employer claimed against. The employer makes no deduction from an employee's paycheck to forward to a central government fund, nor does the employer contributions to such a fund on the behalf of the employees (as is the case for Social Se-

curity). An employer pays out nothing prior to an adjudication of liability. The burden of such liability is exclusively with the employer and its not shifted to the employee.

There is no minimum age requirement before an employee is eligible to collect workers' compensation, providing an injury was sustained through the employment. Nor is there a minimum period of time an employee must work before recovery can be obtained; the right attaches at the commencement of work. Additionally, compensation is paid for temporary and partial injuries, as well as total, permanent disability. N.J.S.A. 34:15-1 *et seq.*

Active workers as well as retirees are eligible to collect workers' compensation awards and are held to the same standards of compensation. In the case now before the Court, only retirees are effected.

Two other points must also be noted. A retiree who is healthy is in a very different position than a retiree who has sustained an injury from the job. The latter must cope, not just with the depressing limitations of bodily injury, but the medical and other incidental expenses concomitant to the disability. Additionally, workers' compensation awards have secondary purposes in that they monetarily punish employers who maintain deleterious workplaces and consequently stimulate salutary improvements.

Retirement pensions have no relation to whether or not an employee has suffered a disability arising from the work relationship. The pension benefit is a result of a contract, not a statutory action at law (where workers' compensation is grounded). Retirement pensions are wages earned during the course of employment but payable after the completion of the work career. *Inland Steel* v. *NLRB,* 170 F.2d 247 (7th Cir., 1948), *cert. den.* 336 U.S. 960 (1949). The Seventh Circuit, in dealing with the meaning of "wages" as used in the National Labor Relations Act, 29 U.S.C. §141 *et seq.,* stated:

> It surely cannot be seriously disputed but that such a pledge [to pay retirement pensions] on the part of the Company forms a part of the consideration for work performed . . . In this view, the pension thus promised would appear to be as much a part of his "wages" as the money paid him at the time of the rendition of his services . . . 170 F.2d at 253.

That pensions are deferred wages is clearest in relations such as that between the parties in this case: a collectively bargained agreement established the hourly or weekly wage levels and the amount of pension contributions.

This Court has acknowledged the nature and distinctiveness of retirement pensions as deferred income on which retirees are entitled to rely for payment. *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 98 S.Ct. 2716 (1978); *City of Los Angeles Department of Water and Power* v. *Manhart,* 435 U.S. 702, 98 S.Ct. 1370 (1978); *Alabama Power Co.* v. *Davies,* 431 U.S. 581, 97 S.Ct. 2002 (1977).

The pension benefit is predicated on a formula combining the number of years worked for which contributions to the pension fund were made and the amount of the contribution at the time the employee retires, provided the employee has reached a minimum age and worked a minimum number of years. There is neither a minimum age requirement nor a minimum years of service requirement for an employee to be entitled to workers' compensation. As previously discussed, no prior contributions are required in the New Jersey workers' compensation program to provide subsequent benefits. Further, under the workers' compensation program, the employee must prove, in a court of law, all the necessary jurisdictional and substantive aspects of his claim before he is entitled to an award. In contrast, a retiree collects

his pension as a matter of routine company administration directly from the company.

The social policy supporting the concept of retirement pensions is that wages are earned from work performed, but payment for such earnings is deferred by agreement between the parties as a means of guaranteeing income to retirees. Workers' Compensation awards are based on an entirely different policy: injuries are compensable by the party causing them. These distinct policies are recognized at least indirectly, by the Internal Revenue Service. The retirement pension is treated as taxable income when it is paid to the retiree (provided the retiree's total taxable income is sufficiently high enough to be taxed). The compensation award, however, is not taxable income, similar to the tax treatment accorded standard negligence awards. See 26 C.F.R. Section 1.104(a) and (b).

Social Security benefits are only superficially similar to workers' compensation awards. This is essentially due to the fact that two types of Social Security benefits are available from one act of Congress, and both are administered by a single bureaucracy. The Act is clear that different eligibility requirements apply to the different benefits.

Retirement benefits under Social Security are available to one who has worked a requisite number of quarter-years over a specified period of time at a job where contributions to the system were made. Additionally, one must attain a minimum age before benefits are available, and such benefits are only payable upon the completion and acceptance of an application. In most cases, there is no adversary proceeding and benefits are administered directly. Federal regulations govern the various requirements concerning contributions, payments and eligibility. ERISA has placed the Federal government further into the field of pension regulation. In this context, Social Security retirement benefits are somewhat similar to retirement pension benefits.

Social Security disability payments are substantially distinct from workers' compensation awards issued in New Jersey Courts. This is evident from the very different purposes served by each and is reflected in the respective standards for eligibility and manner of administration. These differences are rooted in the separate purposes and goals each attempts to fulfill and cannot be logically or realistically ignored or distored. The Court of Appeals could reject these fundamental differences as "meaningless" only by obliterating the plain meanings of words in a statute.

Due to the contradiction between 26 C.F.R. §1.411(a)-4(a) and the statutory provisions concerning nonforfeitability, and due to the regulation's evident expansion of the statute stemming from the Internal Revenue Service's lack of understanding of the distinct natures of workers' compensation awards and vested retirement pensions, the regulation must be struck down as invalid.

**D. The nonforfeitability requirement of ERISA mandates that vested pension benefits cannot be offset by concurrent receipt of worker's compensation irrespective of pension plan provisions.**

The respondent contends that if a workers' compensation offset is deemed to be part of a "normal retirement benefit" in an accrued benefit formula pursuant to 29 U.S.C. §1002 (22) (23), then it does not violate §1053 (a)'s prohibition against forfeitures of vested pension benefits. Moreover, they argue that if the forfeiture of that vested benefit is contained in the formula for the calculation of benefits, it does not amount to a forfeiture. Rather, they characterize the offset as merely an "integration" of benefits under the plan and not in any manner regulated by ERISA's vesting and nonforfeitability provisions. To accept such a provision not only would completely ignore the language utilized by Congress in ERISA, but would emasculate Congressional purpose and intent and render ERISA a meaningless piece of legislation.

By this argument, the Plan seeks to ignore vesting and nonforfeitability sections of ERISA and all the precedents established by *Nachman* and the previously described lower court decisions. The GMC Plan position is that despite the clearly recognized rule of nonforfeitability contained in §3 (19) and §203 (a) vested accrued benefits should be subject to contractually imposed additional conditions subsequent to the receipt of such full benefits. It is maintained that the full benefits which are nonforfeitable are only those vested benefits which a plan chooses to provide in the first place. Such a position, of course, completely nullifies the vesting and nonforfeitability sections of ERISA by subjecting supposedly nonforfeitable and unconditional vested benefits to any conceivable plan imposed condition.

Moreover, GMC's incredible assertion that the concept of nonforfeitability is subject to whatever condition that pension plan subsequently imposed, proves altogether too much, for it would permit a participant's retirement benefit to be forfeited or reduced for countless other reasons which Congress clearly deemed impermissible and inconsistent with the notion of nonforfeitability. In fact, such reasoning carried to extreme would permit forfeitures based upon illegal "bad boy" clauses and would allow offsets of items such as state lottery or racetrack winnings or veterans' benefits "under the plan". The plain fact of the matter is that ERISA prohibits the imposition of any conditions precedent or subsequent to the receipt of vested pension benefits.

Reduced to its naked terms, the respondent's argument is that it may impose any conditions upon the receipt of vested benefits so long as the condition is somehow included in the benefit calculation *under the plan.* It is a simple matter to see through that type of simplistic reasoning. See *Utility Workers,* supra and *Stong,* supra. It clearly is a distinction without a difference; the plan is merely saying that if it puts the cart before the horse rather than the horse before the cart, there is no violation

ERISA. This also seems to be the bottom line reasoning of the *Buczynski* Court below. This line of reasoning presumes Congress to have enacted toothless legislation, the requirements of which can be evaded by the mere insertion of an offset provision in the plan. The clear statutory language of ERISA evidences the absurdity of this "under the plan" argument. Though ERISA may not set forth a minimum amount of benefits, there is no vested right to any benefits if the plan can subsequently divest an employee of his already accrued vested retirement.

Clearly, it was not the intent of Congress to allow such semantical differences to affect the employees' vested rights. Congress intended to protect employees from the previous economic realities in which employees lost pension benefits after long years of service with an employer. The GMC Plan offset provision is applied subsequent to the time that the petititoners began receiving vested pension benefits pursuant to §203 (a)(2) of ERISA and subsequent to the calculation of the benefits under the plan.[3] There-

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[3] Respondent's argument that the offset is a part of the calculations of benefits rather than a forfeiture of vested benefits must fall under §105 (a) and §209 (a) of ERISA. The former section, 29 U.S.C. §1025 (a) requires the plan administrator to supply a participant (on request) a written statement indicated:

> (1) the total benefit accrued, and;
> (2) the nonforfeitable pension benefits which have accrued on the earliest date on which benefits will become nonforfeitable.

§209 (a), 29 U.S.C. §1059 (a), a record keeping and reporting provision, requires a report "sufficient to inform the employee of his accrued benefit under the plan and the percentage of such benefits which are nonforfeitable under the plan".

These provisions, requiring reporting of the amount of accrued and nonforfeitable retirement benefits at any given time, dispose of respondent's claim that somehow a post-retirement compensation award is part of the calculation of benefits. Obviously, the retirement benefits have vested and become nonforfeitable (in a calculable amount) prior to that time. Clearly the GM offset constitutes not a benefit calculation, but rather a forfeiture of vested (nonforfeitable) retirement pension benefits and must fall under ERISA's strict requirements.

fore, viewed in this sequence, there is a clear condition which causes a forfeiture of vested pension benefits. This condition is the subsequent forbearance of filing workers' compensation claims for work related injuries.

The position of respondent and the Court below completely eviscerates ERISA by allowing a pension plan to reduce a participant's already vested benefit by the amount of payment later received from any collateral source for any purpose. Since Congress did not intend employees' efforts during their employment to provide income for their retirement to be nullified by such offset provisions, the workers' compensation offset must be invalidated. Regardless of when the forfeiture occurs, it is a forfeiture in fact and a total loss of vested nonforfeitable pension benefits. Calling it integration does not alter this fact.

This identical argument was raised in *Utility Workers.* The District Court there held:

> "Having determined that the Plan treats the workmen's compensation offset as an integral part of the normal retirement benefit, the question arises whether the offset violates the nonforfeitability provisions of 29 U.S.C. §1053. It is not enough merely to determine that the Plan defines the normal retirement benefit as a certain sum, less any offset, and then conclude that the Plan beneficiary has received all he is entitled to. It is necessary to inquire into the nature of the offset to see if it violates the Act
>
> . . .
>
> To hold that any forfeiture or suspension of benefits is permissible as long as it is sanctioned by the plan is to turn the *entire statutory scheme upon its head.*" 453 F.Supp. at 452. (Emphasis added.)

The District Court in *Stong,* likewise rejected the identical argument holding:

> "The defendants' position boils down to this: The workers' compensation reduction authorized by §3.11

> is integrated by §3.1 into the formula for calculating the 'normal retirement benefit' and 'accrued benefit' 'under the plan' within the meaning of 29 U.S.C. §1002(22), (23), and it does not therefore constitute a forfeiture of benefits to which an employee has an unconditional right. One court's response to this contention was: 'To hold that any forfeiture or suspension of benefits is permissible as long as it is sanctioned by the plan is to turn the *entire statutory scheme upon its head . . .' Utility Workers,* supra, at 452". *Stong, supra.*

Subsequent to the *Stong* Court's decision on June 18, 1979, the Defendant Intervenor, the Secretary of the Treasury, moved to reconsider that Decision and Order and on December 10, 1979, Judge Gordon, in denying the Motion to Reconsider, held:

> The Secretary contends that the nonforfeiture requirement applies only after the "normal retirement benefit" has been calculated "under the plan" and that the worker's compensation offset provision is merely part of the formula for calculating such normal retirement benefit. Therefore, no forfeiture of normal retirement benefits is effected by reducing a worker's pension in proportion to any worker's compensation benefits he may recover.
>
> As I suggested previously, 472 F.Sup. at 1092, acceptance of this argument would open a Pandora's box which Congress intended to nail shut by defining "nonforfeitable" as narrowly and precisely as it did in 29 U.S.C. §1002(19). The critical fallacy in the Secretary's reasoning is this: The challenged offset is *not* part of the formula for calculating the normal retirement benefit; rather, the offset imposes a condition subsequent on a worker's right to receive his normal retirement benefit. It is this placing of a

condition (the recovery of workers' compensation benefits) on the right to receive otherwise fully due retirement benefits that brings the offset provision squarely within the forfeiture definition, making the offset a clear violation of the act.

Finally and perhaps most cruelly, is the fact that the petitioners here (injured retirees) will collect no pension benefits during the period of offset. This would clearly constitute a total loss. Surely the previously earned pensions are no more available to them because the respondent calls its reduction an integration of benefits. The simple fact of the matter is that the Plan provision operates to suspend the employee's pension benefit. Moreover, increases in levels of Social Security cannot be offset. §1054(b) of ERISA and §401(a)(15) of the Internal Revenue Code. Under GMC's contention and plan, there is no such level when workers' compensation payments will not continue to be forfeited. Certainly no qualified pension plan entirely suspends an employee's pension benefit for the period of time that he is entitled to receive Social Security. This fact alone demonstrates that the offset euphemistically characterized by defendants as an "integration", constitutes nothing less than a total forfeiture of vested pension benefits and the normal retirement income which Congress intended to guarantee employees.

As discussed in part I-C of this brief, *supra*, respondent has attempted to set the statutory force of ERISA on its head and to relegate the unambiguous language of ERISA to a back seat by arguing that workers' compensation offsets against retirement pensions have previously been permitted.[4] More unfortunate is that fact that the Third

[4] In addition to arguments favoring the offset based on 26 U.S.C. §401 (a)(5), the tax code anti-discrimination provision and the pre-ERISA Revenue Ruling 68-243, supra, it has been suggested that . . . the case of *Renshaw* v. *U.S. Pipe and Foundry Co.*, 30

*(Footnote continued on following page)*

Circuit accepted respondent's argument in this matter.

Such an attempt to subvert that policy of ERISA is hopefully doomed to failure, because the passage of ERISA did not constitute a continuation of previous pension plans, but rather signified a major shift in policy. Greenough and King, *Pension Plans and Public Policy,* supra. Pre-ERISA law was formulated from the standpoint of quali-

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*(Footnote continued from preceding page)*

N.J. 458, 153 A.2d 673 (1959) supports the proposition that the previous policy in this country was to allow workers' compensation offsets against pension benefits. However, New Jersey statutory law as well as other existing case law clearly refutes this argument. For example, the enactment of Chapter 156 of the Laws of 1977, amending N.J.S.A. 34:15-1 *et seq.*, shows strong public policy in opposition to offsets of compensation against retirement pensions and provides that:

> "The right of compensation granted by this chapter [the New Jersey Workers' Compensation Act] may be set off against disability pension benefits or payments, but shall not be set off against employees' retirement pension benefits or payments."

Moreover, the *Renshaw* Court, as discussed supra, recognized that workers' compensation payments were made, not for a loss of earning power, but for an injury to the body. Clearly, this can also be cited as strong indication that the *Renshaw* Court noted the difference between Social Security retirement benefits and workers' compensation, though it felt constrained to allow such a pension deduction.

Cases in opposition to the decision in *Renshaw* include *City of Lincoln* v. *Steffensmeyer,* 279 N.W. 272 (1938). In *Lincoln,* the Court was determining whether a worker could receive workers' compensation and pensions. The Court determined that such recovery did not allow him double protection or double compensation for the same injury. The *Lincoln* Court held that a pension is not synonymous with compensation but will not operate to bar his right to a pension. In addition, in *Lumsden* v. *Despatch Shops,* 171 N.Y.S.2d 189 (1958), the New York Court maintained that a retiree could receive a pension as well as compensation if the disability arose from occupational causes.

fication of the pension plan for favorable tax treatment. ERISA was enacted to provide, *inter alia,* standards for vesting of participant's benefits, funding of pension plan liabilities and fiduciary duties of plan administrators. § 2 of ERISA, 29 U.S.C. §1001. Therefore, decisions and interpretations of the offset area, prior to ERISA, are of virtually no value in interpreting the post-ERISA state of the law.

Finally, respondent has argued that another agency charged with the responsibility of interpreting ERISA allows workers' compensation offsets. GMC cites regulation §2605.2 of the Pension Benefit Guarantee Corporation (an agency established under ERISA) claiming said regulation (which states that a pension benefit can be combined with Social Security or workers' compensation if they "provide a substantially level income to the recipient") should be accorded great deference. This argument, however, suffers from the same lack of statutory support that makes Treas. Reg. 1.411 (a)-4(a) a nullity. This PBGC regulation has also been rejected by Justice Stewart in *Nachman* as contrary to ERISA.

In addition, PBGC regulations only apply to plan terminations under Title IV of ERISA (29 U.S.C. §1302) and do not relate to Title I provisions such as §203. Therefore, no administrative practice under any Internal Revenue Code section is relevant to or can supercede the nonforfeitable vested rights of pensioners guaranteed by the admirably clear and unambiguous language of ERISA's §§3 (19) and 203(a), 29 U.S.C. §§1002(19) and 1053.

## II. Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 (prohibiting offsets of workers' compensation awards against retirement pensions) is a proper exercise of state power, not pre-empted by E.R.I.S.A., 29 U.S.C. §1144(a).

Chapter 156 of the New Jersey Law of 1977 became effective on July 14, 1977 as an amendment to the New Jersey Workers' Compensation Act. Said law specifically amended N.J.S.A. 34:15-29, by providing:

> "The right of compensation granted by this Chapter may be set off against disability pension benefits or payments, but shall not be set off against employees' retirement pension benefits or payments."

The respondents herein and the U.S. Court of Appeals for the Third Circuit, in its opinion below, offer a very simplistic argument to support their claim of pre-emption of this law. They begin with Section 514(a) of ERISA, 29 U.S.C. 1144(a), which provides:

> "Except as provided in Subsection (b) of this Section [Section 514(b), exempting causes of action which arose prior to January 1, 1975, is not relevant in this action] the provisions of this Title and Title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 4 (a) and not exempt under Section 4 (b). This section shall take effect on January 1, 1975".

Continuing with the fact that the General Motors Hourly Rate Employees Pension Plan is an employee benefit plan under Section 4 (a), 29 U.S.C. 1003 (a), not exempt under Section 4 (b), 29 U.S.C. 1003 (b), which has never been disputed, the court below and the respondents focus on the New Jersey law. Claiming that said state law relates to employee benefit plans brings the argument to its syllogistic conclusion that the New Jersey law is pre-empted by ERISA.

The Third Circuit and the respondents have ignored the fact that Chapter 156 was enacted as an amendment to the New Jersey Workers' Compensation Act. With one exception, ERISA makes no reference to workers' compensation. It is difficult to fathom a federal statute such as ERISA, purporting to pre-empt state law in an area not even regulated by the federal law. Such an interpretation surely goes beyond broad pre-emption of the pension field to the point of infringing upon the state police power.

ERISA does make mention of workers' compensation at Section 4 (b) (3), 29 U.S.C. 1003 (b) (3), wherein a plan "maintained solely for the purpose of complying with applicable workmen's compensation laws . . ." is exempted from the provisions of Title I of ERISA. Admittedly, the General Motors Pension Plan is not exempt under this provision. However, the inclusion of a workers' compensation exemption, within the body of ERISA, shows that Congress recognized that workers' compensation, being within the traditional sphere of state regulation, was not to be interferred with by the enactment of ERISA.

This Court has also recognized that workers' compensation falls within the state police power. In *De Canas* v. *Bica*, 424 U.S. 351 (1976), this Honorable Court held:

> "State possesses broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workers' compensation laws are only a few examples."

In enacting Chapter 156 of the laws of 1977 amending N.J.S.A. 34:15-29, the State of New Jersey was merely exercising that state police power to regulate the employment relationship and protect workers within the state. Passage of this law was another step in ongoing regulation of the employment relationship, which began with

the passage of the first workers' compensation law in New Jersey in 1911. As discussed, *supra,* this exercise of the state police power, i.e., regulation of the employment relationship, has resulted in a mandatory system of compensation in New Jersey, whereby the sole redress for work-related injury is a workers' compensation action, *Renshaw* v. *U.S. Pipe and Foundry Co., supra; Dudley* v. *Victor Lynn Lines, supra.* If the Third Circuit decision in the case at bar is permitted to stand, the rights of states to regulate the employment relationship and to protect workers within the state will be rendered meaningless. States will have no ability to ensure that workers are actually compensated for those injuries deemed by the states to be compensable.

Chapter 156 of the New Jersey Laws of 1977 surely constitutes a proper exercise of state police power. It evidences an effort by the State to require an employer to pay that compensation to a worker which a state tribunal has awarded in the form of a judgment. The offset provision in Article IV, Section 2 of the General Motors Pension Plan, whereby the compensation award is offset, dollar for dollar, against the employee's retirement pension, leaves the injured employee in the same economic position as the uninjured employee and in the same position as said injured employee before he received a compensation award. The New Jersey Law in question was enacted to avoid this result; to require that the injured employee actually received the amount of compensation awarded him. If a state has the power to regulate the employment relationship, to protect workers within its borders and to set up a system of compensation for work-related injuries, that state must surely have the power to require an employer to pay a compensation award for which said employer has been held liable. Unfortunately, this is not true under the Third Circuit decision. In finding laws such as the instant New Jersey Statute pre-

empted under Section 514 of ERISA, 29 U.S.C. 1144, the court below enables employers to offset compensation awards against retirement pensions, rendering the compensation awards meaningless, while leaving the states powerless to enforce the workers' compensation awards. For the petitioners herein, the right to be compensated for work-related injuries will have been reduced to a hollow shell. State authority, under the police power ,to regulate the employment relationship and protect workers in the state, will have become a sham. ERISA, instead of protecting employee's pension rights, will serve to deprive employees of much traditional state protection, while providing nothing in the place of such protections. There is no language, expressed or implied, anywhere within the statutory scheme of ERISA or its legislative history showing such intent on the part of Congress. Petitioners submit it is inconceivable that Congress, under the guise of protecting employees' retirement benefits, could have pre-empted protections to workers, carefully fashioned by states such as New Jersey over long periods of time.

As the foregoing discussion respectfully shows and as the United States District Court for the District of New Jersey found:

> "However, the New Jersey statute at issue here is in no way concerned with pension plans qua pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to workers' compensation disability benefits. This is clear from the language of the statute itself." (Appendix at 53).

This is not a case where a state has attempted to legislate in the face of Congressional pre-emption. Congress, via Section 514 of ERISA, 29 U.S.C. 1144, has pre-empted state regulation of pensions. Congress has not shown any intent to pre-empt state regulation in other areas, e.g., workers' compensation, which may have the most

marginal effect on pensions. Absent a clear Congressional intent to pre-empt (in an area where states have traditionally exercised power) pre-emption should not be found. *Jones* v. *Rath Packing Co.*, 430 U.S. 514 (1977). As Congress has shown no intent to pre-empt the area of workers' compensation, pre-emption should not be found. In a case involving the National Labor Relations Act, *Farmer* v. *Carpenters,* 430 U.S. 290 (1977), this Honorable Court said:

> "Our cases indicate, however, that inflexible application of the [pre-emption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme."

The State of New Jersey most definitely has a strong interest in protecting workers within its borders and ensuring that those workers are compensated for injuries suffered in the course of employment. Since that state's interest does not threaten to interfere with federal regulation of private pension plans, there is no reason for the New Jersey statute to be pre-empted. Recognizing Chapter 156 of the New Jersey Laws of 1977 as a proper exercise of state police power would also be consistent with this Court's decision in *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, (1963), holding that pre-emption should not be found absent:

> ". . . persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained."

Neither persuasive reason is present here. Congress has not unmistakably ordained pre-emption of state workers' compensation laws, and the nature of the subject matter, i.e., compensation for employment-related injury has al-

ways been regulated by the states. In such a situation, the statutory schemes should be reconciled with one another. *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117 (1973).

The *Buczynski* court, in holding the New Jersey law pre-empted, found that Chapter 156 of the Laws of 1977 relates to pension plans. The difficulty with that conclusion is self-evident. Under the Third Circuit decision, payments received by retired workers, pursuant to state workers' compensation laws, are offset against retirement pensions. The amount of the offset (which equals the amount of the compenstion payment) is determined by the state compensation law. Therefore, the state workers' compensation law, in effect, determines the amount of the offset against the retirement pension which pension is subject to ERISA. The entire state workers' compensation law thus "relates to pension plans' every bit as much as the provision of that law prohibiting offsets "relates to pension plans". Under the Third Circuit rationale, all state workers' compensation laws should be pre-empted in their entirety, because they relate to pension plans. The fact that such a result is untenable further shows that preemption under §514 of ERISA, 29 U.S.C. 1144, cannot apply to state laws, regulating areas other than private pension plans, which tangentially relate to such plans.

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, while presenting the Conference Committee Report on ERISA, referred to pre-emption as ". . . eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. S. 15,737 (1974). Of course, a finding that the New Jersey law in question is invalid will have precisely the opposite result. Since each state has its own workers' compensation statute, there are fifty different systems of compensation presently in effect. The petitioners herein would probably have recovered different amounts of workers' compensation had they been employed

in other states. Their injuries might have resulted in higher awards in other states. Again, it is the amount of the workers' compensation award which determines the amount of the retirement pension offset. Therefore, General Motors retirees, from different states, will experience different pension offsets. Such a situation presents a far cry from the uniformity which pre-emption was supposed to guarantee. If Chapter 156 of the New Jersey Laws of 1977 is found to be a valid exercise of the state police power, not pre-empted by ERISA, General Motors retirees form New Jersey will all receive their retirement pensions in full. Only when offsets of compensation against retirement pensions are prohibited nationwide, will private pension plans subject to ERISA be free from the vagaries of conflicting and inconsistent state laws.

Case law in another area of traditional state regulation, namely enforcement of alimony and child support arrearages, exhibits that ERISA has not and should not be construed so as to pre-empt state laws bearing only a tangential relationship to the purpose of the federal statute. In *American Telephone and Telegraph Co.* v. *Merry,* 592 F.2d 118 (2nd Cir., 1979), the U.S. Court of Appeals for the Second Circuit upheld a state court garnishment of pension benfits against the pre-emption provision of ERISA, 29 U.S.C. 1144. In rejecting the argument that the garnishment order, enforcing alimony and support obligations, is pre-empted, the court stated:

> "Such a literal construction, however, would necessarily lead to the unreasonable conclusion that Congress intended to pre-empt even those state laws that only in the most remote and peripheral manner touch on pension plans."

In rejecting the pre-emption argument, the Court referred to "fundamental principles of stautory interpretation" whereby:

> "Courts have presumed that the basic police powers of States, particularly the regulation of domestic relations, are not suspended by federal legislation unless that was the clear and manifest purpose of Congress." *See also, Cody* v. *Riecker,* 594 F.2d 314 (2nd Cir., 1979) and *Biles* v. *Biles,* 163 N.J. Super. 49 (Ch. Div., 1978). 592 F.2d 118.

As in the *Merry* case, *supra,* Chapter 156 of the New Jersey laws of 1977 touches on pension plans only in the most remote and peripheral manner. Furthermore, it is in an area of the basic police powers of States, i.e. workers' compensation, which should not be superseded by federal laws, unless it was the clear and manifest purpose of Congress to pre-empt that area of State law. Since Congress has shown no such intent to pre-empt state workers' compensation laws, the New Jersey statute in question is not pre-empted under Section 514 of ERISA, 29 U.S.C. 1144.

The New Jersey law constitutes a proper exercise of state police power, in an area traditionally reserved to the states. It is, therefore, not pre-empted by ERISA. As a valid law, the New Jersey statute, as applied through the "unless prohibited by law" clause in Article IV, Section 2 of the General Motors Pension Plan, serves to prohibit respondent's offsetting of workers' compensation awards against the petitioners' retirement pensions.

## CONCLUSION

**For all of the reasons set forth above, the judgment (issued in lieu of a formal mandate) of the United States Court of Appeals of March 27, 1980, should be reversed, and the Amended Order issued by the United States District Court, District of New Jersey, on April 5, 1979, should be reinstated.**

Respectfully submitted,

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# APPENDIX

## Statutes and Regulations

**26 U.S.C. §401(a)(5)**

(a) Requirements for Qualification.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section.

> (5) A classification shall not be considered discriminatory within the meaning of paragraph (4) or section 410(b) (without regard to paragraph (1)(A) thereof) merely because it excludes employees the whole of whose remuneration constitutes "wages" under section 3121(a)(1) (relating to the Federal Insurance Contributions Act) or merely because it is limited to salaried or clerical employees. Neither shall a plan be considered discriminatory within the meaning of such provisions merely because the contributions or benefits of or on behalf of the employess under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of such employees, or merely because the contributions or benefits based on that part of an employee's remuneration which is excluded from "wages" by section 3121(a)(1) differ from the contributions or benefits based on employee's remuneration not so excluded, or differ because of *any retirement benefits created under State of Federal law.* For purposes of this paragraph and paragraph (10), the total compensation of an individual who is an employee within the meaning of subsection (c)(1) means such individual's earned income (as defined in subsection (c)

(2)), and the basic or regular rate of compensation of such an individual shall be determined, under regulations prescribed by the Secretary, with respect to that portion of his earned income which bears the same ratio to his earned income as the basic or regular compensation of the employees under the plan bears to the total compensation of such employees. For purposes of determining whether two or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan, if the amount of contributions on behalf of the employees allowed as a deduction under section 404 for the taxable year with respect to such plans, taken together, bears a uniform relationship to the total compensation or the basic or regular rate of compensation, of such employees, the plans shall not be considered discriminatory merely because the rights of employees to, or derived from, the employer contributions under the separate plans do not become nonforfeitable at the same rate. For the purposes of determining whether two or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan, if the employees' rights to benefits under the separate plans do not become nonforfeitable at the same rate, but the levels of benefits provided by the separate plans satisfy the requirements of regulations prescribed by the Secretary to take into account of the differences in such rates, the plans shall not be considered discriminatory merely because of the difference in such rates. For purposes of determining whether one or more plans of an employer satisfy the requirements of paragraph (4) and of section 410(b), an employer may take into account all simplified employee pensions to which only the employer contributes. (emphasis added)

*Statutes and Regulations*

**29 U.S.C. §1002(19)**

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

**29 U.S.C. §1053(a)**

§ 1053. Minimum vesting standards

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

| Years of service: | Nonforfeitable percentage |
|---|---|
| 5 | 25 |
| 6 | 30 |
| 7 | 35 |
| 8 | 40 |
| 9 | 45 |
| 10 | 50 |
| 11 | 60 |
| 12 | 70 |
| 13 | 80 |
| 14 | 90 |
| 15 or more | 100. |

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated

from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

| If years of service equal or exceed— | and sum of age and service equals or exceeds— | then the nonforfeitable percentage is— |
|---|---|---|
| 5 | 45 | 50 |
| 6 | 47 | 60 |
| 7 | 49 | 70 |
| 8 | 51 | 80 |
| 9 | 53 | 90 |
| 10 | 55 | 100. |

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the

participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

> (i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and
>
> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from em-

ployer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount with-

drawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross Reference.—

For nonforfeitably[1] where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

**29 U.S.C. §1144(a)**

SUPERSEDURE; EFFECTIVE DATE

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

*Statutes and Regulations*

**26 C.F.R. §1.411(a)-4(a)**

(a) Nonforfeitability. Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right, is a forfeitable right at that time. Certain adjustments to plan benefits, such as adjustment in excess of reasonable actuarial reductions, can result in rights being forfeitable. Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse towards satisfaction of his nonforfeitable benefits from other than the plan assets for the Pension Benefit Guaranty Corporation. *Furthermore nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.* To the extent that rights are not required to be nonforfeitable to satisfy the minimum vesting standards, or the nondscrimination requirements of section 401(a)(4), they may be forfeited without regard to the limitations on forfeitability required by this section. The right of an employee to re-

purchase his accrued benefit, for example under section 411(a)(3)(D), is an example of a right which is required to satisfy such standards. Accordingly, such a right is subject to the limitations on forfeitability. Rights which are required to be prospectively nonforfeitable under the vesting standards are nonforfeitable and may not be forfeited until it is determined that such rights are, in fact, in excess of the vesting standards. Thus, employees have a right to vest in the accrued benefits if they continue in employment of employers maintaining the plan unless a forfeitable event recognized by section 411 occurs. For example, if a plan covered employees in Division A for Corporation X under a plan utilizing a 10-year-100 percent vesting schedule, the plan could not forfeit employees' rights on account of their moving to service in Division B of Corporation X prior to completion of 10 years of service even though employees are not vested at that time. (emphasis added)

**N.J.S.A. 34:15-29. Compensation preferential lien; claim not assignable; set offs**

The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments. Amended by L.1977, c.156, §1, eff. July 14, 1977.